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Attorneys for Plaintiff
Nutrishare, Inc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Nutrishare, Inc., a California corporation,
Plaintiff,
v.
BioRx, LLC, an Ohio Limited Liability
Company,
Defendant.

Case No. 2:08-CV-01252-WBS-EFB

**REQUEST TO FILE NEWLY
DISCOVERED EVIDENCE IN SUPPORT
OF MOTION FOR PRELIMINARY
INJUNCTION**

Plaintiff Nutrishare, Inc. (hereinafter "Nutrishare") hereby respectfully requests that the Court accept for filing the *Declaration of Kerry Stone Regarding Actual Confusion*, and the *Supplemental Declaration of Rodney Okamoto*, both of which are submitted herewith for filing, on the grounds that these declarations contain newly-discovered evidence supporting Nutrishare's Motion for Preliminary Injunction, filed on June 24, 2008.

Specifically, on June 24, 2008, along with its moving papers, Plaintiff submitted several declarations containing evidence of actual confusion by third parties regarding the source, affiliation, relationship, or sponsorship of the products and services offered by Nutrishare and NutriThrive. Since Plaintiff filed its moving papers, Plaintiff has become aware of another individual – Kerry Stone – who became confused regarding the sponsorship of products and services offered by Nutrishare and NutriThrive. In addition, yet another individual – the

1 President of the Accreditation Commission for Healthcare (ACHC) – has expressed his concerns
2 regarding the likelihood of confusion between Nutrishare and NutriThrive. Both incidents further
3 support Plaintiff’s arguments regarding actual confusion and potential harm to the public
4 resulting from the likelihood of confusion between two parties.

5 Plaintiff realizes that these declarations are being submitted after its moving papers.
6 However, they represent newly discovered evidence of which Plaintiff was unaware on June 24,
7 2008. Rather than submit this new evidence along with its reply brief, due on June 27, 2008,
8 Plaintiff would like to submit this evidence now in order to provide Defendant with this evidence
9 long before its opposition papers are filed. Defendant has ample time to address this evidence, as
10 its opposition papers are due on July 21, 2008, nearly two weeks from today.

11 For the foregoing reasons, Plaintiff respectfully requests that the Court accept for filing
12 the *Declaration of Kerry Stone Regarding Actual Confusion* and the *Supplemental Declaration of*
13 *Rodney Okamoto*, and consider this evidence as if it had been submitted with Plaintiff’s Motion
14 for Preliminary Injunction, filed on June 24, 2008. Plaintiff intends to serve Defendant with these
15 Declarations immediately upon the Court’s entry of the proposed order lodged herewith.

16 Dated: July 8, 2008

DOWNEY BRAND LLP

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18 By: /s/ Michael J. Thomas
19 MICHAEL J. THOMAS
20 Attorney for Plaintiff
21 Nutrishare, Inc
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**DECLARATION OF KERRY STONE
REGARDING ACTUAL CONFUSION**

I, Kerry Stone, hereby declare as follows:

1. I am an individual residing in La Jolla, California. I make this declaration of my own personal knowledge, and if called to testify, could and would testify consistent with the facts stated herein.

2. I am a registered dietitian with Crescent Healthcare, Inc., a home infusion provider. I have known of Nutrishare for several years and am acquainted with its co-founder, Tom Diamantidis.

3. As I make this declaration, I am attending the 2008 Oley Foundation Conference in San Diego, California, which began on Thursday, July 26, 2008 and ends tonight. I am representing Crescent Healthcare, Inc., which is one of the exhibitors at this conference. A sign on the table at lunch yesterday indicated that lunch was sponsored by NutriThrive. The name

1 “NutriThrive” looks so similar to “Nutrishare” that I got confused and mistakenly believed that
2 lunch was going to be sponsored by Nutrishare. By the time I took a lunch break yesterday, the
3 food had run out and I was left with very little to eat. So I mentioned to Nutrishare’s founder
4 Tom Diamantidis, “well, you sponsored the lunch, didn’t you?” Tom said, “no, NutriThrive is
5 sponsoring the lunch.”

6 I declare under penalty of perjury under the laws of the United States and the State of
7 California that the foregoing is true and correct to the best of my knowledge.

8 Dated this 28th day of June, 2008, at San Diego, CA.

9
10 
11 _____
Kerry Stone

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**SUPPLEMENTAL DECLARATION OF
RODNEY OKAMOTO IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

Date: August 4, 2008
Time: 2:00 p.m.
Dept: Courtroom 5

I, RODNEY OKAMOTO, hereby declare as follows:

1. I am an individual residing in Galt, California. I make this declaration of my own personal knowledge, and if called to testify, could and would testify consistent with the facts stated herein.

2. I am co-founder and President of Plaintiff in this action, Nutrishare, Inc.

3. The Accreditation Commission for Healthcare, Inc. (ACHC) is one of the primary national organizations that accredits in-home healthcare providers, including providers of total parenteral nutrition (hereinafter "TPN"). Attached as Exhibit A is a true and correct copy of a message from the President of the ACHC, Thomas E. Cesar, describing the purpose of the ACHC.

4. Although Defendant BioRx, LLC, is accredited by the ACHC, its in-home TPN

1 division, NutriThrive, is not accredited. On Wednesday, July 2, 2008, I spoke with Mr. Cesar to
2 discuss my concerns that NutriThrive is misleading the public by saying it is accredited by the
3 ACHC, when it is not accredited, and he assured me that the matter is being investigated by the
4 ACHC. Mr. Cesar also told me that, in his opinion as president of the leading organization that
5 licenses in-home healthcare providers, it is dangerous and not in the best interests of the public
6 for BioRx to continue to use the "NutriThrive" name, given Nutrishare's similar name and nearly
7 identical therapeutic specialty, because it is likely to confuse the public. According to Mr. Cesar,
8 the ACHC's Director of Accreditation, Sherry Hedrick, shares this opinion.

9 I declare under penalty of perjury under the laws of the United States and the State of
10 California that the foregoing is true and correct to the best of my knowledge.

11 Dated this 8th day of July, 2008, at Galt, California.

12 
13
14 RODNEY OKAMOTO



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President's Message



Thomas E. Cesar
President

I am pleased to welcome you to the Accreditation Commission for Health Care, Inc.(ACHC) World Wide Web site. ACHC is one of the few standard-setting accrediting bodies for home care and alternate site organizations in the country. We offer accrediting programs developed by providers for providers that reflect criteria that are conducive to providing quality care. ACHC is a not-for-profit organization that has been a symbol of quality since 1986.

Utilizing experienced healthcare leaders, we offer accreditation services to a variety of community-based organizations. Our process measures the performance of an organization from its administration to its service delivery. Achieving accreditation testifies that an organization sufficiently complies with ACHC standards.

ACHC is certified to ISO 9001:2000 by DNV. ISO is an internationally recognized standard for quality. Driven by commitment to excellence in the delivery of best customer services in accreditation, ACHC became the first national healthcare accreditor in the U.S. and in the world to obtain this mark of distinction. We appreciate your interest in our company.



“ Our experiences with the ACHC accreditation process have been positive. The effort put forth by the ACHC staff is perceptible as they use the survey process as a tool to help our company become even better.”

Home MediService, Inc; Havre de Grace, MD

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Web site Issues? [webmaster @ achc.org](mailto:webmaster@achc.org)

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**[PROPOSED] ORDER GRANTING
REQUEST TO FILE NEWLY
DISCOVERED EVIDENCE IN SUPPORT
OF MOTION FOR PRELIMINARY
INJUNCTION**

The Court, having considered Plaintiff's *Request to File Newly Discovered Evidence in support of Motion for Preliminary Injunction*, and finding good cause therefor, hereby grants Plaintiff's request. The Court hereby accepts for filing the *Declaration of Kerry Stone Regarding Actual Confusion* and the *Supplemental Declaration of Rodney Okamoto*, and will consider this evidence as if it had been submitted with Plaintiff's Motion for Preliminary Injunction, filed on June 24, 2008.

IT IS SO ORDERED.

Dated: _____, 2008

UNITED STATES DISTRICT COURT JUDGE

DOWNEY BRAND LLP
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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Downey Brand LLP, 555 Capitol Mall, Tenth Floor, Sacramento, California, 95814-4686. On July 8, 2008, I served the within document(s):

**REQUEST TO FILE NEWLY DISCOVERED EVIDENCE IN SUPPORT
OF MOTION FOR PRELIMINARY INJUNCTION (WITH
ATTACHMENTS)**

- ☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- ☐ **BY HAND:** by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- ☒ **BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.
- ☒ **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.
- ☐ **BY PERSONAL DELIVERY:** by causing personal delivery by _____ of the document(s) listed above to the person(s) at the address(es) set forth below.

COURTESY COPY
VIA MAIL

VIA FEDERAL EXPRESS

Attorney for BioRx, LLC

BioRx, LLC

Eric Hill

Patricia B. Hogan
Keating Muething & Klekamp PLL

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 8, 2008, at Sacramento, California.

/s/ Patricia L. Pineda
Patricia L. Pineda